No. 92-918

Supreme Court, U.S.
FILED
NOV 27 1992
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOSEPH PETER FRANKENBERRY,
Petitioner

v.

JAMES MORGAN, SUPERINTENDENT,
SCI PITTSBURGH AND
THE COURT OF COMMON PLEAS
COUNTY OF FAYETTE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William C. Costopoulos, Esquire
Counsel of Record for Petitioner
COSTOPOULOS, FOSTER & FIELDS
831 Market Street
Lemoyne, Pennsylvania 17043
Telephone: (717) 761-2121

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred in failing to grant Petitioner a certificate of probable cause from the denial of his habeas corpus petition where the District Court and Trial Court found that the prosecutor at trial committed intentional misconduct by calling a witness to the stand whom he knew would invoke the Fifth Amendment, which misconduct implicates a constitutional due process violation and states a reasonably meritorious ground for appeal?

B. Whether the Court of Appeals erred in failing to grant Petitioner a certificate of probable cause where the Trial Court permitted the testimony of one Theodore Slagel, which was so vague and contradictory as to deprive Petitioner of his right to a trial?

LIST OF ALL PARTIES

The parties to the habeas corpus action in the Court of Appeals are: Joseph Peter Frankenberry, Petitioner herein, by and through his counsel of record, William C. Costopoulos, Esquire; and James Morgan, Superintendent, State Correctional Institution at Pittsburgh, Pennsylvania, and the Court of Common Pleas of Fayette County, Pennsylvania, Respondents herein, by and through their counsel of record, John A. Kopas, III, Assistant District Attorney, Fayette County, Uniontown, Pennsylvania.

TABLE OF CONTENTS

	Page
REFERENCE TO OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	3
STATEMENT OF THE CASE	5
REASONS FOR ALLOWANCE OF WRIT	9

APPENDIX:

Order of the United States Court of Appeals for the Third Circuit, entered on October 5, 1992, denying the petition for panel rehearing . A44

Order of the United States Court of Appeals for the Third Circuit, entered on August 31, 1992, denying the request for certificate of probable cause A46

Order of the Honorable District Judge Zeigler dated February 27, 1992, denying the petition for writ of habeas corpus and certificate of probable cause, and adopting Magistrate's Report A47

Order of the Honorable Magistrate Judge Lancaster dated January 27, 1992, denying petition for writ of habeas corpus A49

TABLE OF AUTHORITIES

Cases — Page(s)

Allen v. Snow, 635 F.2d 12 (1st Cir.1980), cert. denied, ___ U.S.___, 111 S.Ct. 993, 112 L.Ed.2d 1077 (1991) 41

Barefoot v. Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) 10-11

Bisaccia v. Attorney General, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980) 41

Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973) 25, 26, 27

Commonwealth v. Musolino, 320 Pa.Super. 425, 467 A.2d 605 (1983) 27

Commonwealth v. Todaro, 524 Pa. 64, 569 A.2d 333 (1990) 22

Commonwealth v. Virtu, 495 Pa. 59, 432 A.2d 198 (1981) 25

Commonwealth v. Wright, 456 Pa. 511, 321 A.2d 625 (1974) 24-25

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1964) 20

Lozada v. Deeds, 498 U.S. ___, L.Ed.2d 956, 111 S.Ct.___ (1991) 11-12, 13

Matzner v. Davenport, 288 F.Supp. 636 (E.D.N.J.1968), aff'd. 410 F.2d 1376 (3d Cir.1969) 12

Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963) . 19-20, 23, 24, 30

Rainer v. Department of Corrections, 914 F.2d 1067 (8th Cir.1990) 41

Todaro v. Fulcomer, 944 F.2d 1079 (3d Cir.1991) 20-22, 23, 24, 25-26, 31-33

Zeigler v. Callahan, 659 F.2d 254 (1st Cir. 1980) 20

Constitutional Provisions and Statutes

Fifth Amendment to the United States Constitution . 3, 9, 13, 17, 21, 22-23, 24, ... 25, 27, 29, 30-31

Sixth Amendment to the United States Constitution 3-4

28 U.S.C.A. 1254(1) 2

28 U.S.C.A. 1651 2

28 U.S.C.A. 2254 2

Rules and Other Citations

Fed.R.A.P. 22(c) 9-10

ABA Standards Relating to the Prosecution and Defense Function, 3-5.7(c) 26-27

REFERENCE TO OPINIONS BELOW

The only opinion delivered in this case is the Report of the United States Magistrate Judge Lancaster, which was adopted as the opinion of United States District Court Judge Zeigler and is reproduced in the Appendix beginning at page A49.

STATEMENT OF JURISDICTION

This Petition is from the denial of the request for a certificate of probable cause for an appeal of a habeas corpus judgment entered on August 31, 1992, by the United States Court of Appeals for the Third Circuit in the matter docketed to No. 92-3146. The request for a panel rehearing was denied by the Court of Appeals in an order entered on October 5, 1992. Your Honorable Court has jurisdiction of this matter pursuant to Sections 1254(1), 1651 and 2254 of Title 28, United States Code.

CONSTITUTIONAL PROVISIONS AND STATUTES

Fifth Amendment to the United States Constitution

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law [.]"

Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall be been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Following a trial by jury, Petitioner was convicted of murder in the first degree and related offenses in the Court of Common Pleas, Fayette County, Pennsylvania. The jury returned a verdict of life imprisonment after the death-penalty hearing. On November 15, 1992, Petitioner was formally sentenced to life imprisonment. The co-defendant, Elmer Wayne Younkin, also was convicted and sentenced to life. According to the Commonwealth's theory of the case, Phoebe Tomasek and Mr. Younkin hired Petitioner and one Charles Ralph Huey to murder Mrs. Tomasek's husband, who in fact was murdered.

Petitioner's timely filed post-trial motions were denied by the lower court. His timely appeal to the Superior Court of

Pennsylvania was denied on August 17, 1984, and the Supreme Court of Pennsylvania declined to review the judgment of sentence on January 8, 1985. This Honorable Court refused his petition for writ of certiorari on May 13, 1985.

On February 11, 1991, Petitioner, proceeding pro se and in forma pauperis, filed a petition for writ of habeas corpus pursuant to 28 U.S.C.A. 2254 in the United States District Court for the Western District of Pennsylvania, which is the instant basis for federal jurisdiction. The Honorable Magistrate Judge Lancaster, in a report filed on January 27, 1992, recommended the denial of the petition for writ of habeas corpus. After exceptions were filed, the Honorable District Judge Zeigler, by order dated February 27, 1992, adopted the Magistrate's Report and

denied both the petition for writ of habeas corpus and certificate of probable cause.

Petitioner timely appealed to the United States Court of Appeals for the Third Circuit which, by order entered on August 31, 1992, denied the request for certificate of probable cause. Instant counsel then entered his appearance on behalf of Petitioner and filed a motion for extension of time within which to file a petition for panel rehearing, which the Court of Appeals granted. A petition for panel rehearing was filed. On October 5, 1992, the Court denied the petition.

Petitioner now timely files this petition for writ of certiorari and respectfully asks Your Honorable Court to review the Court of Appeal's refusal to grant him a certificate of probable

cause in the denial of the habeas corpus judgment.

REASONS FOR ALLOWANCE OF WRIT

A. The Court of Appeals erred in failing to grant Petitioner a certificate of probable cause from the denial of his habeas corpus petition where the District Court and Trial Court found that the prosecutor at trial committed intentional misconduct by calling a witness to the stand whom he knew would invoke the Fifth Amendment, which misconduct implicates a constitutional due process violation and states a reasonably meritorious ground for appeal.

Fed.R.A.P. 22(a) states in relevant part:

> In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless

a district or a circuit judge issues a certificate of probable cause.

What constitutes the probable cause necessary to allow an applicant to take an appeal, however, is not defined by rule or statute. This Court has held that an appellant must make a "substantial showing of the denial of [a] federal right[]" in order to obtain a certain of probable cause;" that is, he must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); original emphasis. This does not mean that the appellant must show that he is likely to be successful on appeal:

> In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right,' obviously the petition need not show that he should prevail on the merits. He has already failed in that endeavor.

Barefoot, 77 L.Ed.2d at 1104, n. 4 (citations omitted).

In its latest pronouncement on this standard, this Court reiterated its Barefoot holding and ruled that the Court of Appeals for the Ninth Circuit erroneously denied a certificate of probable cause where, although trial counsel may have been ineffective, the petitioner had failed to show prejudice. Lozada v. Deeds, 498 U.S.___, 112, L.Ed.2d 956, 960-961, 111 S.Ct.___ (1991). "We conclude that the Court

of Appeals erred in denying Lozada a certificate of probable cause because under the standards set forth in Barefoot Lozada made a substantial showing that he was denied the right to effective assistance of counsel." Ibid. See also Matzner v. Davenport, 288 F.Supp. 636, 640 (E.D.N.J.1968), affirmed 410 F.2d 1376 (3d Cir.1969). (certificate denied "on the ground that this Court cannot conceive of any meritorious ground for appeal.")

Petitioner respectfully submits that the Court of Appeals erred in denying his request for a certificate of probable cause for the reasons below. In the instant case, notwithstanding the ultimate conclusion of harmless error by the courts below, the finding of prosecutorial misconduct based on the district

attorney knowingly calling a witness (who intended to invoke the Fifth Amendment) to the stand in the presence of the jury sets forth a colorable constitutional claim and, therefore, should support the granting of a certificate of probable cause: the issue presented here is certainly "debatable among jurists of reason." As in Lozada v. Deeds, supra, Petitioner here has made a "substantial showing" that he was denied a fair trial as a result of the prosecutor's misconduct.

Petitioner was charged with committing a contract murder. At trial, the chief Commonwealth witness and alleged co-conspirator was one Charles Huey, who repeatedly referred to a man by the name of "Ben" throughout his testimony. He testified that "Ben" had earlier

been mentioned in connection with a contract murder; that Petitioner was getting together with "Ben" and a man named Elmer (the codefendant); and that "Ben" did not want to accept the contract because "Ben" was a friend of Elmer's.

Huey further testified that he discussed "Ben" with FBI Agent Harelson; that "Ben" could not take the contract because he was busy; that "Ben" was a friend of Elmer's and later "Ben" introduced Elmer to Petitioner. Agent Harelson was next called to the stand to corroborate Huey's testimony.

On cross-examination, co-defendant's counsel established from Agent Harelson that Huey, in his statement, said that "Ben" was initially contacted by Elmer to execute the contract murder but was unable to do so because

he was too busy. Finally, he testified that Huey told the FBI that "Ben" had introduced Elmer to Petitioner for the purpose of actually fulfilling the terms of the contract and committing the murder, the very murder for which Petitioner was on trial. By any account, the mystery man "Ben" was a central figure in the Commonwealth's case against Petitioner and the jury was primed for his appearance.

The jury was not to be disappointed. After the FBI man, the prosecutor -- in full view of the jury and in open court -- called none other than Benedict Wujs to the witness stand. This was the infamous "Ben" the Commonwealth had been attempting to prove, through Huey and Harelson, was responsible for bringing Elmer and Petitioner together. Before Wujs could be sworn

and testify, however, this is what transpired:

MR. SOLOMON: Benedict Wujs.

MR. ROSKOVENSKY: Your Honor, might we approach the bench.

THE COURT: No.

MR. ROSKOVENSKY: Your Honor, this is concerning this witness.

THE COURT: Will you take the jury over to the jury deliberation room please.

Let the record show the jury is leaving the court room at 4:00 p.m.

Let the record show the jury is gone.

Wujs was then sworn and the District Attorney made the following offer of proof:

This witness is being called to testify as to a conversation that he had with Elmer Younkin following the shooting death of John Tomasek, regarding John Tomasek, and a conversation

which he had with Joseph Frankenberry regarding the shooting of John Tomasek.

Upon questioning of Wujs, with the jury no longer in the courtroom, Wujs proceeded to invoke the Fifth Amendment to all questions asked. The trial court refused to grant him immunity and defense counsel's motion for a mistrial was denied.

The trial court, the Magistrate Judge and the District Court all came to the factual conclusion that the District Attorney called Ben Wujs to the witness stand, in front of the jury, when he knew he would invoke his constitutional right against self-incrimination. The Magistrate Judge, in his opinion adopted by the District Court, held that "the district attorney had been informed that this witness was going to assert

his privilege against self-incrimination." (p. A57). And he further found that calling Wujs as a witness with this foreknowledge constituted prosecutorial misconduct, although it did not constitute reversible error: "Although the trial court found evidence of prosecutorial misconduct, it determined no prejudice had occurred because there had been no inquiry made of Wujs in the presence of the jury." (p. A58). Thus, the prosecutor indisputably committed misconduct; the question, then, was -- and is-- what are the consequences of that misconduct on Petitioner's right to a fair trial? And most narrowly, for the specific purpose of whether the Court of Appeals should hear the merits of Petitioner's habeas corpus petition, does the express finding of prosecutorial misconduct

necessarily raise an arguable deprivation of constitutional rights and, at a minimum, warrant the issuance of a certificate of probable cause?

The leading case in this area remains Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), where this Court held that reversible "error may be based upon a concept of prosecutorial misconduct, when the government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege" or where, "in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination and thus unfairly prejudiced the defendant." Id., 83 S.Ct. at 1154-1155. As the Honorable Circuit Judge

Mansmann of the Court of Appeals noted in dissent, "The principles articulated in Namet were 'elevated to a constitutional plane in Douglas v. Alabama, 380 U.S. 415 [85 S.Ct. 1074, 13 L.Ed.2d 934] (1964).' Zeigler v. Callahan, 659 F.2d 254, 272 n. 12 (1st Cir.1980)." Todaro v. Fulcomer, 944 F.2d 1079, 1086 (3rd Cir.1991). Once the District Court found the prosecutor had committed misconduct, in the context of the Namet issue, it follows that "a colorable constitutional claim[]" was made. Id., 944 F.2d at 1085-1086.

Indeed, in Todaro v. Fulcomer, supra, the Court of Appeals below granted a certificate of probable cause in a Namet-type case and entertained the appeal from the denial of a habeas corpus petition even though none of the

courts below -- the trial court, the Pennsylvania Superior Court, the Pennsylvania Supreme Court or the District Court -- found that the prosecutor had even committed misconduct. The issue was whether an evidentiary hearing should have been held on Todaro's claim that the prosecutor had knowingly called a witness to the stand, which witness subsequently invoked his Fifth Amendment privilege. The witness was called, he asserted his privilege outside of the jury's hearing, and he stepped down from the stand; no explanation or cautionary remark was given to the jury. The Pennsylvania Supreme Court declined to find that the prosecutor knew the witness would assert his privilege against self-incrimination and further determined that Todaro was not prejudiced by this incident. See Commonwealth v. Todaro, 524 Pa.

64, 569 A.2d 333 (1990). The Court of Appeals agreed that "the state trial court's fact-finding procedure in which it determined that the prosecutor did not engage in misconduct afforded the defendant a 'full, fair, and adequate hearing.' 28 U.S.C. [sec.] 2254(d)(6)." Todaro v. Fulcomer, supra, 944 F.2d at 1083.

If the Court of Appeals saw fit to grant a certificate of probable cause in Todaro, where the issue was the necessity of a hearing to determine whether the prosecutor had engaged in misconduct by calling a witness to the stand who silently invoked the Fifth Amendment and was withdrawn, surely it would seem that Petitioner's case is worthy of a certificate to ascertain the degree of prejudice suffered by Petitioner in light of the uncontested determination that the

prosecutor here committed misconduct in calling Wujs as a witness when he knew that he intended to assert the Fifth. This finding of prosecutorial misconduct critically distinguishes the case at bar from Todaro, raises a debatable question among jurists, and warrants the award of a probable cause certificate. What happened to Todaro at trial happened to Petitioner at trial, with the profound addition of the district attorney's actual misconduct, which is the crucial consideration under Namet (373 U.S. at 187) absent in Todaro but omnipresent here. For this reason, Petitioner respectfully suggests that the court below misapplied both Todaro and Namet when originally considering his request for a certificate.

That the invocation of the Fifth Amendment

was not heard by the jury is not the sole determining factor with regard to prejudicial error. The Pennsylvania Supreme Court long ago held that:

> [I]t is reversible error for the prosecution, once informed of a witness' intention to claim a privilege against self-incrimination, to call that witness to the stand before the jury where the witness is likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose.

Commonwealth v. Wright, 456 Pa. 511, 321 A.2d 625, 626 (1974). "The prosecution may not suggest by indirection what is barred by the rules of evidence or testimonial privilege from demonstrating by direct testimony." Id., 321

A.2d at 627. In Commonwealth v. Virtu, 495 Pa. 59, 432 A.2d 198 (1981), the Pennsylvania Supreme Court found especially troubling the case where, as here, the prosecutor had foreknowledge of a witness' intention to invoke the Fifth Amendment and yet called him to the stand: "Even more damaging is the indisputable fact that the prosecution had actual knowledge of the witness' intent to exercise his Fifth Amendment privilege if called to testify at trial." Id., 432 A.2d at 202; original emphasis. That Court reiterated this view by quoting from Commonwealth v. DuVal, 453 Pa. 205, 307 A.2d 229 (1973) at some length in Commonwealth v. Todaro, supra:

> Where it is the prosecutor who attempts to use such a device, there is a special vice: the inference to be drawn from the refusal to

testify of the defendant's co-defendant, accomplice or associate has no probative value whatsoever in establishing the guilt of the defendant. It is rather an effort to cause the jury to think "guilt by association."

DuVal, 307 A.2d at 232-233, original emphasis; Todaro, 569 A.2d at 335. And the American Bar Association has condemned such a practice for ethical reasons:

A prosecutor should not call a witness who he knows will claim a privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct.

ABA Standards Relating to the Prosecution and Defense Function, 3-5.7(c); Commonwealth v. DuVal, supra, 307 A.2d at 234; Commonwealth v. Musolino, 320 Pa.Super. 425, 467 A.2d 605, 610 (1983).

At Petitioner's trial, the District Attorney intentionally tried to have the jury find him guilty of murder through "guilt by association," which is the most severe prejudice emanating from calling a prosecution witness to the stand when one knows he will assert his Fifth Amendment rights. Early in the trial, defense counsel informed the trial judge, the prosecutor, and counsel for the codefendant of Wujs' intention to invoke his privilege. Two months before trial, the District Attorney actually met with Wujs to review his Pennsylvania State Police

and FBI statements and, at that time, in light of the incriminating nature of them, Wujs himself informed the prosecutor that he would take the Fifth. And yet with the jury present in open court, after over some two-and-one-half days of testimony in which the name "Ben" was repeated and repeated in connection with Petitioner by the Commonwealth's chief witness and an FBI agent, the District Attorney nevertheless calls none other than "Benedict Wujs" to the witness stand, which results in the jury being sent home for the day absent any explanation or instruction. This was a classic example of "guilt by association."

The prejudice to Petitioner was not only sustained inside the courtroom, for the media naturally focused on the silent witness for the Commonwealth. The local newspapers in

Connellsville and Greensburg had front-page headlines about Wujs being called to the stand, his invocation of the Fifth Amendment, and the denial of his request for immunity. And the Sunday morning edition of the Uniontown Herald-Standard further had a front-page story on Wujs.

Needless to say, the jury could only link Petitioner adversely to the mystery man "Ben," which was precisely the prosecutor's intention in calling him in the first instance. This result was achieved irrespective of whether the jury actually heard Wujs assert his privilege against self-incrimination, for the damage was done by his being called and not testifying. The testimonial references to "Ben" and Petitioner immediately preceding this incident, together with the prosecutor calling Ben Wujs as his

witness and Wujs ultimately not testifying, especially since the District Attorney knowing beforehand he would refuse to testify, "added critical weight to the prosecutor's case in a form not subject to cross-examination. . . . " Namet, 373 U.S. at 187. Whether this misconduct is sufficient to mandate a new trial is a question distinct from the "colorable constitutional claim" raised by Petitioner here, which supports the grant of a probable-cause certificate to allow the Court of Appeals to weigh the prejudice on the merits.

That the jury did not hear the Fifth Amendment invocation does not obviate Petitioner's "viable claim of prejudice" instantly. For as the Honorable Circuit Judge Mansmann cogently stated in Todaro:

It may be that even if the outstanding factual questions were not resolved favorably to Todaro [i.e., the jury did not overhear the invoking of the Fifth Amendment], Todaro still would have a viable claim of prejudice. The danger of "guilt by association" inherent in a case involving a co-conspirator's assertion of the fifth amendment privilege is obvious. There is a strong argument that the danger of "guilt by association" was present in this case <u>even if it is determined that the jury did not overhear Kinsey's assertion of the fifth amendment privilege.</u> At the time that Kinsey was called to the stand and excused without testifying, the jury was thoroughly familiar with Kinsey and his alleged role in the case.

> Even though Kinsey did not testify, the jury was made aware that Kinsey was in jail and may well have used Kinsey's guilt as substantive evidence against Todaro or may have inferred that Kinsey's testimony would have implicated Todaro. The likelihood that Kinsey's appearance was prejudicial is increased by the court's failure to explain Kinsey's dismissal or to offer any cautionary instruction.

Todaro v. Fulcomer, 944 F.2d at 1087; emphasis supplied. For the same reasons that Todaro (who was granted a certificate) should have been entitled to an evidentiary hearing "in the context of an evaluation of the overall claim of prejudice," ibid., so, too, should Petitioner's assertion of prejudicial trial error based on

uncontested prosecutorial misconduct be weighed thorough the grant of a certificate of probable cause to appeal. Your Honorable Court is respectfully asked to grant certiorari and consider this habeas corpus petition on its merits.

B. The Court of Appeals erred in failing to grant Petitioner a certificate of probable cause where the Trial Court permitted the testimony of one Theodore Slagel, which was so vague and contradictory as to deprive Petitioner of his right to a trial.

Petitioner's trial was additionally fundamentally unfair given the testimony of the Commonwealth witness, Theodore Slagel. First, Mr. Slagel testified contrary to the prosecutor's offer of proof. Second, the testimony was prejudicially self contradictory. And third, it was irrelevant, with the prejudice inuring Petitioner outweighing any probative value the evidence may possibly have.

The District Attorney, at sidebar, made

the following offer of proof to the trial court:

> Mr. Slagel has indicated that he can identify the weapon -- that, I believe, is Commonwealth's Exhibit 14 -- and, also, as to the statement made to him by Frankenberry regarding the shooting of the truck driver in Uniontown.

Petitioner's counsel objected and informed the court that this offer of proof was factually unfounded:

> Your Honor, I am going to tell the Court, at this point, that I have talked to Mr. Slagel about this statement. Mr. Slagel will say there was no mention about any truck driver or whatever. I think,

before we bring the jury back, we should see what he is going to say, so the Court can determine if the fact is relevant to this matter. There is nothing in his statement about any type of truck driver.

The trial court refused the request for an *in camera* hearing and overruled the objection to the testimony.

Contrary to the Commonwealth's promised testimony, Mr. Slagel was unable to remember any supposed statement by Petitioner regarding Petitioner's shooting of a truck driver:

Q: And my client never told you that he shot anybody, that he shot a truck driver, did he?

A: No.

Q: And you are not even sure what he did tell you?

A: Just what I said, I don't --

Q: You don't remember, you don't remember what he said --

A: He heard of shot --

Q: You don't remember, do you?

A: No.

This testimony obviously had nothing to do with the Commonwealth's offer of proof to the judge. The Magistrate Judge himself displayed confusion over this line of testimony in considering the habeas corpus petition. He wrote that: "Slagel testified that petitioner told him that petitioner had shot a man in the face four times with the weapon." See p. A55. An accurate review of the evidence manifests that Slagel said

no such thing; he couldn't even remember what Petitioner had purportedly said to him.

In addition, although the prosecutor represented that the witness would testify as to a gun in connection with Petitioner, his actual testimony was so speculative, conjectural and confused as to render it both irrelevant and prejudicial. On cross examination, Mr. Slagel stated:

Q: Mr. Slagel, is it your testimony that you are not sure whether you saw this gun at Joe Frankenberry's house?

A: I said I seen one like it in there.

A: You are not sure that this is the gun, are you? It only requires a yes or no. Are you certain?

A: I just know it looks like it, that's all.

Q: But you are not certain, yes or no? If you are not sure, just answer, "I'm not sure."

A: Looks like it except for that broken grip.

Q: The grip is different.

A: Yea, yes.

Q: And you do not recall the conversation you don't recall what was said, do you?

OBJECTION, OVERRULED

A: And you have told me on earlier cross-examination that you are not sure what was said, is that no correct?

A: I said he said one thing or the other.

Q: So you are not sure what he said, isn't that right? If you are not sure he said one thing or the other, you are not sure what he said?

A: I'm not sure what he said of those two.

For the primary witness against Petitioner to be permitted to testify this contradictorily about a gun he "maybe" saw in Petitioner's house, in a capital murder case, is nothing less than a significant abuse of discretion by the trial judge.

Based on the testimony of Mr. Slagel, one could readily conclude that Petitioner here has made a

"substantial showing" that this evidence was "so gross, conspicuously prejudicial, or otherwise of such magnitude that it fatally infected the trial." Rainer v. Department of Corrections, 914 F.2d 1067, 1072 (8th Cir.1990), cert. denied, __ U.S.___, 111 S.Ct. 993, 112 L.Ed.2d 1077 (1991). The trial court's evidentiary error so "infused the trial with inflammatory prejudice as to render a fair trial impossible." Allen v. Snow, 635 F.2d 12 (1st Cir.1980), cert. denied, 451 U.S. 910 (1981). And this trial error was of constitutional dimensions because it deprived Petitioner of fundamental fairness in the criminal trial. See Bisaccia v. Attorney General, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980).

The admission of Mr. Slagel's testimony, which

was vague and contradictory and thus to Petitioner's great prejudice, at a minimum is debatable among reasoned judges such that a certificate probable cause for appeal should issue.

WHEREFORE, Petitioner, Joseph Peter Frankenberry, based on the foregoing reasons, respectfully requests that Your Honorable Court grant this writ and direct the Court of Appeals to consider the appeal from the denial of his habeas corpus petition on the merits.

RESPECTFULLY SUBMITTED:

William C. Costopoulos, Esquire
COSTOPOULOS, FOSTER & FIELDS
831 Market Street/P.O. Box 222
Lemoyne, Pennsylvania 17043
Phone: (717) 761-2121
COUNSEL OF RECORD FOR PETITIONER

APPENDIX

Order of the United States Court of Appeals for the Third Circuit, entered on October 5, 1992, denying the petition for panel rehearing . A44

Order of the United States Court of Appeals for the Third Circuit, entered on August 31, 1992, denying the request for certificate of probable cause A46

Order of the Honorable District Judge Zeigler dated February 27, 1992, denying the petition for writ of habeas corpus and certificate of probable cause, and adopting Magistrate's Report A47

Order and Opinion of the Honorable Magistrate Judge Lancaster dated January 27, 1992, denying petition for writ of habeas corpus A49

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 92-3146

JOSEPH PETER FRANKENBERRY,

vs.

JAMES MORGAN, ET AL.

MANSMANN, COWEN and ROTH, CIRCUIT JUDGES

ORDER

The petition for panel rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is denied.

BY THE COURT:

_____
Carol Los Mansmann
Circuit Judge

DATED: October 5, 1992.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. No. 92-3146

JOSEPH PETER FRANKENBERRY,

vs.

JAMES MORGAN, ET AL.

MANSMANN, COWEN and ROTH, CIRCUIT JUDGES

ORDER

The foregoing request for a certificate of probable cause is denied.

BY THE COURT:

Carol Los Mansmann
Circuit Judge

DATED: August 31, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-0241

JOSEPH P. FRANKENBERRY,
Petitioner

v.

JAMES MORGAN, et al.

MEMORANDUM ORDER

The instant petition for writ of habeas corpus was referred to United States Magistrate Judge Gary L. Lancaster in Rules 3 and 4 of the Local Rules for Magistrates. The Magistrate Judge filed his Report, which concluded that the petition should be denied. Petitioner filed objections. After de novo review of the pleadings and documents in the case, together with Magistrate Judge's Report and objections thereto, the following order is entered this 27th

day of February, 1992:

1) The petition for writ of habeas corpus is denied.

2) A certificate of probable cause is denied.

3) The Report of Magistrate Judge Lancaster is adopted as the Opinion of the court.

Donald E. Zeigler
United States District Judge

DATED: February 27, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-0241

JOSEPH P. FRANKENBERRY,
Petitioner

v.

JAMES MORGAN, et al.

REPORT OF MAGISTRATE JUDGE LANCASTER

Petitioner, Joseph P. Frankenberry, is a prisoner at the State Correctional Institution at Pittsburgh, Pennsylvania. Proceeding pro se and in forma pauperis, he seeks a writ of habeas corpus pursuant to 28 U.S.C. [sec.] 2254. The complete state court record has been filed with, examined by, this court and reveals that petitioner has exhausted his available state court remedies as required by section 2254(b) and (c). For the reasons set forth herein, the

petition should be denied and a certificate of probable cause for appeal be denied.

I. BACKGROUND

Petitioner was convicted of murder in the first degree and related offenses in the Court of Common Pleas of Fayette County, Pennsylvania. Broadly stated, the Commonwealth's evidence was that Phoebe Tomasek and Elmer Wayne Younkin hired the petitioner and one Charles Ralph Huey to murder Mrs. Tomasek's husband. The jury returned a verdict of guilty and fixed the penalty as life imprisonment. Petitioner's trial was consolidated with that of Elmer Wayne Younkin who was likewise convicted of the same charges.

On November 15, 1982, petitioner was sentenced to life imprisonment on the first degree murder

charges, and an additional 5-10 years on the related charges to run consecutive to the life sentence. The conviction was affirmed by the Superior Court of Pennsylvania on August 17, 1984. The Supreme Court of Pennsylvania denied leave to appeal on January 8, 1985. The United States Supreme Court denied petitioner's petition for writ of certiorari on May 13, 1985.

Petitioner raises the following issues in this application for habeas corpus relief:

1) The trial court erred when granting the Commonwealth's petition to consolidate his trial with that of co-defendant;

2) the court erred in permitting the Commonwealth to present evidence and the testimony of Theodore Slagel relative to the identification of a handgun;

3) the court erred in failing to declare a mistrial when the Commonwealth called a witness, Benedict Wujs, to the witness stand in the presence of the jury when the Commonwealth had been informed that said witness would invoke his rights against self-incrimination;

4) petitioner was sentenced in violation of the provisions of the Inter-state Agreement on Detainers Act, 18 U.S.C. App.

II. DISCUSSION

A.

We first consider the issue of the consolidated trial. Petitioner's argument is principally based on his contention that consolidating his trial with that of his co-defendant, violated

several provisions of the Pennsylvania Rules of Criminal Procedure relating to consolidation and severance.

A state prisoner is entitled to federal habeas relief only if he is held "in custody in violation of the Constitution, or laws, or treaties of the United States." 28 U.S.C. [sec.] 2254(a). However, the Supreme Court has clearly stated that "federal habeas corpus relief does not lie for errors of state law." Estelle v. McGuire, 112 S.Ct. 475 (1991) (quoting Lewis v. Jeffers, 110 S.Ct. 3092 (1990)). The Court stated

> Today we reemphasize that it is not the province of a federal habeas corpus to reexamine state court determinations on state law questions. In conducting federal habeas

review, a federal court is limited to deciding whether a conviction violated constitution, laws, or treaties of the United States.

Id. Thus, whether the trial court violated Pennsylvania rules of criminal procedure is irrelevant to a federal habeas review.

Petitioner has failed to direct us to any authority which holds that consolidating trial for co-defendants arising from the same criminal episode, including criminal conspiracy, is inherently unconstitutional. In fact, it is well established that it is not. See generally Commonwealth v. Morales, 494 A.2d 367 (Pa.1985) (decision to sever is within sound discretion of the trial judge). Nor, other than some generalized conclusory averments, has petitioner

indicated how he was prejudiced by the consolidation or that the consolidation adversely impacted upon the fundamental fairness of his trial. This ground provides no basis for federal relief.

B.

Petitioner next contends that the court erred in admitting the testimony of one Theodore Slagel. The relevant portion of the trial transcript shows that Mr. Slagel testified, over the objection of petitioner's counsel, that he saw a handgun, similar to the one used to shoot the victim, in petitioner's home. Additionally, Slagel testified that petitioner told him that petitioner had shot a man in the face four times with the weapon. According to the state trial

court's opinion, the testimony elicited at the trial, independent of Mr. Slagel's evidence, established that the victim was shot several times one of which being in the face. The court determined that the testimony was relevant and properly admitted for the jurors' consideration. We agree with the state court's analysis and find that the evidence was properly admitted.

Moreover, even if it were properly admitted, evidentiary errors of state courts are not considered to be one of constitutional proportion, cognizable in federal habeas corpus proceedings, unless the error deprives defendant of fundamental fairness in the criminal trial. Bisaccia v. Attorney General, 623 F.2d 307 (3d Cir.), cert. denied, 449 U.S. 1042 (1980). In other words, an evidentiary error will rise to

constitutional magnitude only if it so infuses the trial with inflammatory prejudice as to render a fair trial impossible. Allen v. Snow, 635 F.2d 12 (1st Cir.1980), cert. denied, 451 U.S. 910 (1981). A review of the record in this case, however, reveals that Petitioner's allegations do not rise to this level of error.

C.

Next, petitioner contends that the court erred in failing to grant a mistrial when the Commonwealth called to the witness stand one Benedict Wujs. Apparently, the district attorney had been informed that this witness was going to asserts his privilege against self-incrimination. However, the record firmly shows that before Wujs took the stand, the jury was removed in order

that an in camera hearing on the matter could be held. It was then that Wujs advised the court that he would invoke his privilege.

Although the trial court found evidence of prosecutorial misconduct, it determined no prejudice had occurred because there had been no inquiry made of Wujs in the presence of the jury. Any misconduct was limited to simply calling him as a witness with the jury present.

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. See generally Smith v. Phillips, 455 U.S. 209, 219 (1982); United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). In other words, we focus not on the prosecutor's conduct, but upon the effect of that

conduct on the trial because only those circumstances impugning fundamental fairness or infringing specific constitutional rights present grounds for habeas relief. Arnold v. Wyrick, 646 F.2d 1225, 1228-29 (8th Cir.1981). Further, all review of prosecutorial misconduct is subject to the over-arching constitutionally harmless error standard of Chapman v. California, 386 U.S. 18, 24 (1967). See United States v. Oxman, 740 F.2d 1298, 1311 (3d Cir.1984).

We agree with the state trial court, that to the extent that calling this witness was improper conduct, it was not prejudicial and clearly does not warrant federal intervention.

D.

Finally, petitioner alleges that his sentence

is unlawful because he was sentenced in violation of the Interstate Agreement on Detainers Act ("Act"), 18 U.S.C.A.App., to which Pennsylvania is a signator. See 42 Pa.C.A. [sec.] 9101 to 9108.

At the time of his arrest on these charges, petitioner was in federal custody serving an unrelated federal sentence. Under the provisions of the Act, he was released to state custody for the purposes of this trial. At the conclusion of the trial, but before sentence was imposed, petitioner was returned to federal custody. According to the state court opinion on this matter, he was returned to federal custody mistakenly, or at least through no fault of the district attorney's office. The record shows that petitioner was again released to state

custody for the purpose of standing trial on other unrelated state charges. It was then that petitioner was sentenced on the homicide at issue here.

Petitioner contends that under the Act, once he was returned to federal custody after the trial, the state lost all jurisdiction over him and was no longer empowered to impose sentence. Thus, the sentence is illegal. We need not dwell on the merits of this claim for there is a more fundamental reason why petitioner is not entitled to relief on the issue.

The parties devoted substantial argument to whether this issue had been exhausted in the state court. The record is clear that petitioner did not raise this issue in his direct appeal. He did, however, raise it in a petition under the

Pennsylvania Post Conviction Relief Act. 42 Pa.C.S.A. [sec.] 9541 et seq. (Purdon Supp. 1991). On November 4, 1988, the trial court entered an opinion and order denying the PCRA petition and petitioner filed an appeal of that order with the Superior Court. However, on February 24, 1989, the Superior Court entered an order quashing the appeal as untimely. On May 17, 1989, the Supreme Court of Pennsylvania denied petitioner's request for writ of habeas corpus without stating its grounds for denial of review. Under such circumstances, the denial can be presumed to be based on a procedural default. See Caswell v. Ryan, 1992 U.S. App. LEXIS 276 (3d Cir.1992).

If a claim is presented to the highest state court, exhaustion does not require that the state

court actually rule on the merits of the claim. Smith v. Digmon, 434 U.S. 332 (1978). Indeed, even where the state court expressly did not consider the merits of a claim on the ground that it was deemed waived as a result of a procedural default, the claim must be considered to be exhausted for purposes of a habeas review. Gonce v. Redman, 780 F.2d 333, 336 (3d Cir.1985).

However, a default in compliance with state procedural rules for raising a claim may constitute waiver and be an independent and adequate state ground for denial of federal habeas corpus relief. See Coleman v. Thompson, 111 S.Ct. 2546 (1991). In Pennsylvania, an untimely appeal in such a procedural default which will preclude federal habeas relief unless the petitioner establishes both cause and

prejudice for the default.

Cause which might excuse a procedural default and afford a state prisoner a federal review "must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." The absence of counsel is not enough. Id. In fact, ineffectiveness of counsel would not provide a sufficient cause to excuse the procedural default because counsel is not constitutionally mandated in a collateral attack on a conviction. Coleman, 111 S.Ct. at 2566. Here, Frankenberry offered no explanation for his default much less one supporting an "external impediment."

Therefore, inasmuch as the state court has refused to consider this claim because of

petitioner's failure to abide by Pennsylvania's procedural rules, and that petitioner has failed to establish legally recognizable cause for that default, he is not entitled to a federal review of that claim.

In accordance with the Magistrate's Act, 28 U.S.C. [sec.] 636(b)(1)(B) and (C), and Rule 4 of the Local Rules for Magistrates, the parties are allowed ten days from the date of service to file objections to this Report.

_____

Gary Lancaster
United States Magistrate Judge

DATED: January 27, 1992.